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IN THE

**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1944

No. 88

**ELLA F. FONDREN AND THE ESTATE OF W. W. FONDREN,
DECEASED, ELLA F. FONDREN, INDEPENDENT
EXECUTRIX, *Petitioners,***

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

**On Petition for a Writ of Certiorari to the United
States Circuit Court of Appeals for the
Fifth Circuit**

BRIEF FOR PETITIONERS IN REPLY

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Regulation Involved

Petitioners recognize both the fundamental soundness and binding effect of TREASURY REGULATIONS 108, Sec. 86.11 (formerly Article 11 of TREASURY REGULATIONS 79, 1936 edition) to the effect that

" 'future interests' is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a par-

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ticular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time."

The issue in the instant case is whether or not, under the trust instruments involved, the gifts to the minor beneficiaries are gifts of future interests, and this issue in turn involves an answer to the question as to whether or not the gifts were

"limited to commence in use, possession or enjoyment at some future date or time."

Discussion of Cases

Petitioners furthermore recognize that the decision in each of the cases cited by Respondent (page 7 of opposing brief) is amply supported by and in harmony with said Sec. 85.11; and while it is not deemed proper in this brief to go into an extended discussion of the cases, it is considered proper to make the following brief observations.

The cases fall logically into the following categories:

1. Cases holding that a gift in trust is a gift of a future interest where the right of the beneficiary to the use, possession or enjoyment is postponed so as to begin at some fixed future date.
 - (a) *FISHER V. COMMISSIONER*, 132 F. (2d) 383 (C.C.A. 9th). In this case the gift of corpus was held to be a gift of a future interest because it was distributable when the beneficiary reached twenty-five years of age.
 - (b) *SENSENBRENNER V. COMMISSIONER*, 134 F. (2d) 883 (C.C.A. 7th). In this case the gift of corpus was held to be a gift of a future interest because it was distributable only at the termination of the trust.

2. Cases holding that a gift in trust is a gift of a future interest where the right of the beneficiary to the use, possession or enjoyment is postponed to begin either at, or by reference to, the happening of some future event.

- (a) *COMMISSIONER V. GLOS*, 123 F. (2d) 548 (C.C.A. 7th), and *HOPKINS V. MAGRUDER*, 122 F. (2d) 693 (C.C.A. 4th). In these cases the gifts were held to be gifts of future interests because no distribution could be made until after the death of donor.

- (b) *HOWE V. UNITED STATES* (C.C.A. 7th), decided April 25, 1944 (1944—P-H, Par. 62,533). In this case the gift of the corpus was held to be a gift of a future interest for the reason that distributions thereof could be made only upon the majority vote of the seven beneficiaries.

3. Cases holding that a gift in trust is a gift of future interest where the right of the beneficiary to the use, possession or enjoyment is postponed to either begin or be dependent upon the discretionary determination of some party other than the beneficiary.

- (a) *HOWE V. UNITED STATES* (C.C.A. 7th), decided April 25, 1944 (1944 P-H, Par. 62,533). In this case the gift of income to the trust was held to be a gift of a future interest because distributions thereof could be made only, if in the judgment of the trustees, such income should not be needed for taxes or other obligations.

- (b) *COMMISSIONER V. GARDNER*, 127 F. (2d) 929 (C.C.A. 7th). In this case the gift was held to be gift of a future interest because distributions were to be made only to the extent that the trustee should deem necessary and proper for the education, support and maintenance of the several grandchildren beneficiaries.

- (c) *FRENCH V. COMMISSIONER*, 138 F. (2d) 254 (C.C.A. 8th), and *WELCH V. PAINE*, 130 F. (2d) 990 (C.C.A. 1st). In these cases the gifts were held to be gifts of future interests because the trustee was authorized in his discretion either to distribute or accumulate income.
 - (d) *COMMISSIONER V. PHILLIPS' ESTATE*, 126 F. (2d) 851 (C.C.A. 5th). In this case the gift was held to be a gift of a future interest because distributions were to be made at the discretion of the trustee.
 - (e) *COMMISSIONER V. TAYLOR*, 122 F. (2d) 714 (C. A. 3d). In this case the gift was held to be a gift of a future interest because distributions were to be made at the sole discretion of the trustee.
 - (f) *HELVING V. BLAIR*, 121 F. (2d) 945 (C.C.A. 2d), and *WELCH V. PAINE*, 120 F. (2d) 141 (C.C. A. 1st). In these cases the gifts were held to be gifts of future interests because distributions were to be made at the absolute discretion of the trustee.
 - (g) *COMMISSIONER V. BRANDEGEE*, 123 F. (2d) 58 (C.C.A. 1st). In this case the gift was held to be a gift of a future interest because the trustee was authorized in his discretion either to pay debts or distribute.
 - (h) *COMMISSIONER V. WELLS*, 132 F. (2d) 405 (C.C. A. 6th). In this case the gift was held to be a gift of future interest for the reason that distributions of both income and corpus rested entirely in the discretion of the trustee.
4. Cases holding that a gift in trust is a gift of present interest so far as it concerns income where the income is to be distributed at periods not substantially longer than twelve months.
- (a) *COMMISSIONER V. LOWDEN*, 131 F. (2d) 127 (C. C. A. 7th), and *FISHER V. COMMISSIONER*,

132 F. (2d) 383 (C. C. A. 9th). In these cases gifts of income were held to be gifts of present interests because income was distributable annually.

(b) *SENSENBRENNER V. COMMISSIONER*, 134 F. (2d) 883 (C. C. A. 7th). In this case a gift of income was held to be a gift of present interest because it was distributable quarterly.

5. Cases holding that a gift in trust is a gift of present interest where the real purpose of the trust is the protection of a minor beneficiary and under the reasonable construction of the trust indenture no real discretion to grant or withhold is vested either in the trustee or a third party.

(a) *SMITH V. COMMISSIONER*, 131 F. (2d) 254 (C. C. A. 8th). In this case the gift of income was held to be a gift of a present interest because, notwithstanding the express provision that the trustee was authorized and directed in his sole discretion to make distributions from both principal and income, the controlling and dominant purpose of the trust was the education, maintenance and benefit of the two grandchildren beneficiaries.

(b) *KINNEY V. ANGLIM*, 43 F. Sup. 431 (N. D. Calif.). In this case the gift was held to be a gift of a present interest to each of the three minor beneficiaries, notwithstanding that during minority distributions were to be made to the mother of the beneficiaries.

Respondent cited the above cases in connection with the statement that

"the time of vesting legal or equitable title is immaterial";

but the meaning of this expression is not altogether clear. If

it is intended to say that the time of vesting of title is without any significance, the statement would not seem to be entirely accurate. If on the other hand the meaning is that the time of the vesting of title is of itself not determinative of the issue, then the statement is correct and is supported by all the cases, and the only question is as to its application to the case in hand.

Problem of Gifts in Trust For Minor Beneficiary

In the case of a gift in trust it is fundamental that legal title is vested in the trustee immediately the gift is completed. If the trust is a mere naked trust, the equitable title is certainly vested in the beneficiary and, in most jurisdictions, for all practicable purposes, this would be equally true as to the legal title. If, however, the trust is not a naked trust, then, notwithstanding the fact that the legal title is vested in the trustee, there is, immediately the gift is completed, a present equitable right or title vested in the beneficiary, the extent, nature and attributes of which right or title depend upon the purpose and effect of the gift as determined from the trust instrument under sound rules of construction.

In the instant case it would not seem reasonable that there can be any substantial differences of opinion as to the character of the title of the respective beneficiaries. Certainly the trusts were not naked trusts, and neither of the beneficiaries was competent to properly administer or utilize the trust estate for his own account. These administrative functions, and these alone, were therefore necessarily appointed to the trustee.

We come now to a very brief consideration of the specific and determinative issue of whether or not under the trust

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now being considered, the use, possession and enjoyment was at the date of gift limited to begin at a future date or time; and this issue must be answered on the basis of the facts existing at the date of the gift and in the light of the purpose of the donor as expressed in the trust instrument.

As indicated above, the outstanding fact is that each beneficiary was a minor of tender years utterly incapable of administering or using the trust property for himself. The dominant purpose of the trust was the benefit and advantage of the specifically named grandchild beneficiary throughout the entire life of the trust. Immediately the trust was created the beneficiary had the assurance and guarantee of food, shelter, education and personal well being; and both principal and income were available to him for these purposes to the full extent of his needs and without any discretion in the trustee or other party to deny or withhold.

It is therefore submitted that, consistent with all decided cases and with both the income tax law and the Treasury Regulations effective when the gifts were made, the fundamentally sound rule of decision is that a gift in trust for the benefit of a specifically named minor beneficiary is a gift of a present interest where the dominant purpose of the trust is the personal well being and advantage of the named minor continuously throughout the entire life of the trust and the accomplishment of such purpose is in no way postponed, conditioned or subordinated to the control or discretion of either the trustee or any other party.

Conclusion

As pointed out in Petitioners' original application, the decision of the Circuit Court of Appeals in the instant case is not supported by any proper understanding of either UNITED STATES V. PELZER, 312 U.S. 399, or RYERSON V.

UNITED STATES, 312 U.S. 405, and is in conflict with the principles applied in SMITH v. COMMISSIONER (supra), SENSENBRENNER v. COMMISSIONER (supra), and KINNEY v. ANGLIM (supra), and under the facts is fundamentally unsound. The Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

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